APPENDIX

IN THE SUPREME COURT
OF THE STATE OF MONTANA
No. 02-639

STATE OF MONTANA,	)
	)
Plaintiff and Respondent,	)
v.	)
	)
TANYA MARIE ANYAN,	)
JAY CLEVELAND, and TROY KLEIN	)
	)
Defendants and Appellants.	)

On May 15, 2003, Appellants filed a Motion to Strike portions of the State's brief, pursuant to Rule 22, M.R.App.P. Specifically, Appellants ask this Court to strike the following portions of the Statement of Facts section of the State's brief: page 5, lines 2-9 and 12-19; page 6, lines 1-4 and 7-8; and page 18, lines 11-14. The sections to which Appellants object discuss an affidavit which was attached to the State's response brief in the District Court. Appellants base their objection on the fact that the affidavit was not offered and admitted as an exhibit at the consolidated evidentiary hearing on suppression motions. The affiant did not testify at the evidentiary hearing, and Appellants argue that it would be improper for affidavits to take the place of live testimony, subject to cross examination, citing *Stefonick*

v. Stefonick (1946), 118 Mont. 528, 530-531, 167 P.2d 867, 868-69. Appellants also point out that the District Court did not specifically reference the affidavit in its Findings of Fact, Conclusions of Law, and Order.

The State responds that it is proper for this Court to review the affidavit in question because it is part of the District Court record. Furthermore, the state points out that while the affiant did not testify at the evidentiary hearing, he did testify in the form of a deposition. During the deposition, the affiant was cross examined regarding the affidavit. The State relies on *State v. Flanagan*, 2003 MT 123, ¶ 16, 68 P.3d 796, ¶ 16 and Rule 9, M.R.App.P., in support of its argument. The State also points out that the District Court stated in its written order that its findings were based in part upon the District Court file and the briefs previously filed.

After considering the motion, on June 3, 2003, we took the matter under advisement and stated that we would address the matter in our forthcoming opinion. On June 26, 2003, we classified this case for oral argument which is scheduled for September 11, 2003. In light of the upcoming oral argument, we concluded that it would be helpful to the parties to rule upon the pending motion before the argument.

We deny the Appellants' Motion to Strike for the following reasons. Rule 9 of the Rules of Appellate Procedure deem the record on appeal as "the original papers and exhibits filed in the district court...." In the District Court, the State filed a Response to Defendant's

Motion and attached Officer Nichols' affidavit to the motion, thus being original papers and as such, part of the record on appeal. Even though the affidavit, as a document, is part of the original papers filed in this case, we still must consider if the substance of the affidavit may be properly considered for *evidentiary purposes*. Here the affidavit was never introduced into evidence during the evidentiary hearing or Officer Nichols' deposition. The Appellant did examine Officer Nichols about the affidavit during his deposition and the Officer answered specific questions regarding the statements made in the affidavit. Having had the opportunity to examine Officer Nichols concerning the affidavit and stipulating to his deposition, we conclude that the affidavit should remain part of the record on appeal.

IT IS HEREBY ORDERED that Appellants' Motion to Strike is denied.

The Clerk of Court shall fax copies of this Order to counsel of record.

DATED this 9th day of September 2003.

Chief Justice

/s/ Jim Regnier

/s/ James C. Nelson

/s/ W. William Leaphart

/s/ Patricia Cotter

/s/ John Warner

/s/ Jim Rice

Justices